

1
2
3
4
5
6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

8 * * *

9 UNITED STATES OF AMERICA,

Case No. 2:18-cr-00001-MMD-CWH

10 Plaintiff,

ORDER

11 v.

12 OANA MARIA SERBAN, *et al.*,

13 Defendant.
14

15 **I. SUMMARY**

16 Serban filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P.
17 12(b)(3)(B)(v) ("Motion").¹ (ECF No. 92.) The Magistrate Judge issued the Report and
18 Recommendation ("R&R") recommending denial of the Motion. (ECF No. 137.) Serban
19 objects to the R&R. (ECF No. 138.) The government filed a response (ECF No. 139),
20 and Serban filed a reply (ECF No. 141).² For the reasons discussed below, the Court
21 overrules Serban's objection, adopts the R&R, and will deny the Motion.

22 **II. RELEVANT BACKGROUND**

23 The grand jury indicted Defendant Oana Maria Serban and two co-defendants on
24 ten counts—Conspiracy to Commit Fraud and Related Activity in Connection with Access
25 Devices, 18 U.S.C. § 1029(b)(2) (Count 1); Possession of Access Device-Making

26 ¹Co-defendant Eugeniv Florian Ciuca moved to join the Motion and Serban's reply
27 (ECF Nos. 98, 108), which the Court granted (ECF No. 137 at 1).

28 ²LR IB 3-2(a) provides that replies are only permitted with leave of court. Serban
did not seek leave of court to file her reply. Nevertheless, the Court has reviewed Serban's
reply.

1 Equipment, 18 U.S.C. § 1029(a)(4) (Count 2); Possession of Fifteen or More Counterfeit
2 or Unauthorized Access Devices, 18 U.S.C. § 1029(a)(3) (Count 3); Use or of an
3 Unauthorized Access Device, 18 U.S.C. § 1029(a)(2) (Count 4); Aggravated Identity Theft,
4 18 U.S.C. § 1028A (Counts 5-9); and Conspiracy to Commit Money Laundering, 18 U.S.C.
5 § 1956(a)(2)(A) & (h) (Count 10). (ECF No. 81.) These charges stem from the
6 government's allegations that defendants engaged in ATM skimming activities to obtain
7 money between August and December 2017. (*Id.*)

8 **III. LEGAL STANDARDS**

9 Serban seeks dismissal under Fed. R. Crim. P. 12(b)(3)(B)(v) for failure to state an
10 offense. In considering a dismissal under Rule 12(b)(3)(B)(v), the district court "must
11 accept the truth of the allegations in the indictment in analyzing whether a cognizable
12 offense has been charged." *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002).
13 The government is not required to state its theory of the case or allege supporting evidence
14 in an indictment; rather, the government need only allege the "essential facts necessary
15 to apprise a defendant of the crime charged." *United States v. Buckley*, 689 F.2d 893, 897
16 (9th Cir. 1982) (quoting *United States v. Markee*, 425 F.2d 1043, 1047-48 (9th Cir. 1970),
17 *cert. denied*, 400 U.S. 847 (1970)).

18 The district court may refer pretrial matters, such as motions to dismiss, to the
19 magistrate judge to make findings and recommendations. 28 U.S.C. § 636(b)(1)(B); LR
20 IB 1-4. Objections to such findings and recommendations are reviewed de novo. 28
21 U.S.C. § 636(b)(1)(C); LR IB 3-2(a).

22 **III. DISCUSSION**

23 Serban seeks dismissal of the five identity theft counts (Counts 5-9) on two
24 grounds: (1) the indictment fails to plead the predicate felonies enumerated in 18 U.S.C.
25 § 1028A(c) as an element of the aggravated identity theft counts; and (2) the indictment
26 fails to plead any elements of terrorism to support a charge of terrorism offense in violation
27 of 18 U.S.C. § 1028A(a)(2). (ECF No. 92.) The Court will address each ground in turn.

28 ///

1 Serban argues that the indictment alleges a violation of use and trafficking in
2 unauthorized access devices in violation of 18 U.S.C. § 1029 but that this section is not
3 an offense enumerated in 18 U.S.C. § 1028A(c). (ECF No. 92 at 5.) The Magistrate Judge
4 found that 18 U.S.C. § 1028A(c)(4) covers as predicate felonies for a § 1028A charge the
5 offenses identified in Title 18, United States Code, Part I, Chapter 47 (“Chapter 47”). (ECF
6 No. 137 at 3.) The Court agrees.

7 Section 1028A(c) states, in pertinent part, that “the term ‘felony violation
8 enumerated in subsection (c)’ means any offense that is a felony violation of -- . . . (4) any
9 provision contained in this chapter (relating to fraud and false statements), other than this
10 section or section 1028(a)(7).” 18 U.S.C. § 1028A(c)(4). “This chapter” refers to Chapter
11 47. *Id.* Felony offenses committed in violation of § 1029 are contained within Chapter 47
12 and are predicate enumerated offenses for a § 1028A charge. *See, e.g., United States v.*
13 *Febles*, No. 2:16-cr-141-NT, 2017 WL 976927, at *1 (D. Me. Mar. 13, 2017). Here, the
14 indictment charges violations of § 1029 in Counts 1 through 4, which serve as predicate
15 felony offenses for the charges of violations of § 1028A(1)(a) in Counts 5 through 9.

16 Serban relies on *United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009), to argue
17 that “[f]ederal appellate authority holds otherwise[]” and suggests double jeopardy would
18 result if § 1029 offenses (which are covered under Chapter 47) are predicate offenses for
19 a § 1028A charge. However, *Bonilla* does not support either argument. To the contrary,
20 the court in *Bonilla* found that § 1029(a)(2) is a predicate felony offense for conviction
21 under § 1028A(a)(1). 579 F.3d at 1242. The court went on to reject the argument that
22 convictions under both § 1029(a)(2) and § 1028A(a)(1) violate the double jeopardy clause,
23 reasoning that “the legislature specifically authorized cumulative punishment.” *Bonilla*,
24 579 F.3d at 1244.

25 As to the second ground for dismissal, the Magistrate Judge recommends denying
26 the Motion because the indictment does not contain any allegation of terrorism as Serban
27 argues. (ECF No. 137 at 4.) In the government’s response to Serban’s objection, the
28 government asserts that the indictment does not plead or even reference § 1028A(a)(2),

1 which Serban relies on to infer charges of terrorism.³ In light of such clarification and the
2 Superseding Indictment's lack of reference to § 1028A(a)(2), Serban's request to dismiss
3 a non-existent charge is denied.

4 **IV. CONCLUSION**

5 The Court notes that the parties made several arguments and cited to several cases
6 not discussed above. The Court has reviewed these arguments and cases and determines
7 that they do not warrant discussion as they do not affect the outcome of the Motion.

8 It is therefore ordered that the Magistrate Judge's Report and Recommendation
9 (ECF No. 137) is adopted. The Court overrules Serban's objection (ECF No. 138).

10 It is further ordered that Defendant's motion to dismiss (ECF No. 92) is denied.
11

12 DATED THIS 19th day of July 2018.
13

14 

15
16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25

26
27 ³The indictment references "Title 18, United States Code, Sections 1028A(a)(1)
28 and 2." (See, e.g., ECF No 81 at 18.) Serban apparently read this to mean § 1028A(a)(1)
and § 1028A(a)(2); however, the government is actually referring to § 1028A(a)(1) and 18
U.S.C. § 2.